Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

The Lutheran Church/Missouri Synod

MM Docket No. 94-10

For Renewal of Licenses of Stations
KFUO/KFUO-FM, Clayton, Missouri

File Nos. BR-890829VC
BRH-890929VB

TO THE COMMISSION

APPLICATION FOR REVIEW

The Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP and the St. Louis County Branch of the NAACP ("NAACP") respectfully request the Commission to reverse the Decision, FCC 96R-23 (released May 3, 1996) because it conflicts with statute, regulation, case precedent and established Commission policy, affirms erroneous findings as to material questions of fact, and ratifies several prejudicial procedural errors manifested in the I.D., 10 FCC Rcd 9880 (1995). See 47 CFR §1.115(b)(2)(i), (iv) and (v). All Exceptions are preserved whether or not expressly restated here. The questions presented for review are:

A. In holding that KFUO did not discriminate based on race, and did not commit dozens of disqualifying misrepresentations in order to cover up its race discrimination, did the ALJ rule so much essential evidence nondiscoverable, nonadmissible, or unworthy of mention that the I.D. can be said to reflect a "curious neutrality in favor of the licensee" and a record which is "beyond repair"?

B. Are discrimination and misrepresentations disqualifying?

I. The ALJ Exhibited A "Curious Neutrality-In-Favor-Of-The-Licensee", Yielding A Record Which Is "Beyond Repair" 1/

At every turn, the hearing was hopelessly one-sided and unfair. The Board's affirmance, based on the record it was given, was a foregone conclusion given several unprecedented ALJ procedural rulings which made it impossible for the NAACP to develop its case. Regrettably, the Board's summary ruling on the NAACP's procedural exceptions, Decision at 7 ¶32, leaves the Commission no hint of how egregious the ALJ's errors were. It should surprise and disturb the Commission that this was the first

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1/ "A curious neutrality-in-favor-of-the-licensee seems to have guided the Examiner in his conduct of the evidentiary hearing." Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 547 (D.C. Cir. 1969) ("UCC II"). The record was "beyond repair," id. at 550.

trial in the NAACP's 87 year history in which a judge struck all of the NAACP's experts[2/] or in which a judge struck the testimony of the only high-status minority employee.[3/] And this appears to be the first reported American job discrimination case in which the respondent's **personnel records** were not made available in discovery.[4/] Although these and other essential proffers[5/] (except a key

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2/ KFUO's prehearing defense, expressed by its counsel and by itself, was that few Blacks would have the skills to work at a classical music station because few Blacks listen to classical music. To show how racist this was, the NAACP offered the testimony of a Fulbright Scholar who is the Concertmaster of the St. Louis Symphony (NAACP Ex. 1); the Director of the University of Missouri-St. Louis' University Chorus (NAACP Ex. 2); the Director of the College Choir at the historically Black Harris-Stowe State College (NAACP Ex. 3); the President of the St. Louis Branch of the National Association of Negro Musicians (NAACP Ex. 4) and the Chairperson of the St. Louis NAACP's annual classical music youth competition (NAACP Ex. 5). They each stated that finding qualified African Americans would have been easy; most of them named several outstanding candidates. However, the ALJ struck all five on relevance and competence grounds (see Tr. 351, 354, 356, 357, and 399, striking NAACP Exs. 1-5) and also struck a NAACP Ex. 61, which contained numerous classical music columns in St. Louis' largest Black newspaper (Tr. 1085). Despite striking these witnesses, the ALJ treated the classical music skills issue as highly relevant by holding that the FCC had actually invited KFUO's racist argument! I.D. at 9908 ¶199.

3/ The witness, Cari Perez O'Halloran, was the only minority employed in what was clearly a nonsecretarial job during the license term. Tr. 1085 (rejecting NAACP Ex. 14). A Black woman briefly worked early in the license term as "Coordinator of Worship Programming", but she was not offered as a witness and there was no evidence of her actual duties, responsibilities or compensation, or of whether she supervised anyone. I.D. at 9891 ¶¶75-76. KFUO also claimed it would have promoted another Black woman if she had not died. Id. at 9892 ¶84, Decision at 2 ¶9. No documentary evidence of any such plan was ever provided, and this assertion is impossible to test because the woman died early in the renewal term.

4/ The ALJ refused on relevance grounds to allow the production of documents written by KFUO managers about the stations' minority employees, or by the minority employees about their working environment at KFUO, or concerning rates of compensation; or White employees' similar files for comparative purposes, on the basis that they would not lead to the discovery of admissible evidence. See Petitioners' Initial Request for Production of Documents, filed March 16, 1994 ("NAACP Production Request"), at 6-8 (Requests 12, 17 and 30) and Motion to Compel Production of Documents, filed April 7, 1994 ("Motion to Compel") at 4-7, denied by MO&O, FCC 94M-282 (released April 21, 1994) ("MO&O") at 2; ALJ's oral ruling during the Deposition of Rev. Paul Devantier, 5/19/94, Tr. 81-94. Thus, NAACP couldn't determine why the Blacks KFUO hired were the only ones hired, why all of them worked in subordinate jobs, whether they were treated or paid equally to Whites, why they were never promoted, what KFUO managers thought of them, or who might have heard KFUO managers discussing Blacks' qualifications to work at a classical station. In all EEO cases in federal and state courts, comparable materials are the very heart of document production. Application of the minimal federal standards of EEO case administration is essential, given the EEOC's reliance on the FCC's nondiscrimination adjudication procedures. Memorandum of Understanding between the Federal Communications Commission and the Equal Employment Opportunity Commission, 70 FCC2d 2320 (1978).

5/ The ALJ refused to permit the NAACP to obtain documents filed by KFUO with other agencies on matters relating to race, color, sex, national origin, religion or age on the theory that such documents would "not appear reasonably related to the discovery of admissible evidence." See NAACP Production Request at 8 (Request #26), Motion to Compel at 7, MO&O at 2.

(n. 5 is continued on p. 3)

NAACP fact witness' testimony)[6/] were rejected on relevance grounds, conclusions on the subject matter merits were reached on the very issues addressed in each proffer, e.g., the astonishing conclusion that there is "not a scintilla of evidence of discrimination."[7/] These beyond-the-pale rulings left the carefully advised, close-knit group of respondents' current and former officials as the only in-person witnesses, assuring that the ALJ would decide the case based on only one version of the facts.

Adding to the "curious neutrality-in-favor-of-the-licensee", the ALJ disregarded what was probably an FCC record number of disqualifying misrepresentations[8/] by refusing to apply Black Letter law that (1) no special misrepresentation issue is required in a hearing[9/] and (2) an applicant is always on notice of the duty to be truthful.[10/] It is astounding that the Decision does not even mention this ruling.

5/ (continued from p. 3) But concurrent filings with other administrative agencies are often quite revealing. Fox Television Stations, Inc., 10 FCC Rcd 8452, 8519-22 (1995) ("Fox"). In addition, the ALJ admitted, then disregarded, five critical and highly relevant NAACP exhibits. These exhibits showed that KFUO waited until the NAACP filed its petition to deny to contact St. Louis' largest Black newspaper and a Black Lutheran community organization about job openings (NAACP Exs. 10, 11 and 15); that KFUO's contentions that it's hard to find "qualified" minorities are belied by the success in hiring minorities enjoyed by every other comparable commercial classical station in the United States (NAACP Ex. 21), and that relatively few KFUO-FM commercial accounts are classical music oriented (NAACP Ex. 65).

6/ Ms. O'Halloran's testimony, proffered the last day of the trial, was rejected because the ALJ felt the NAACP could have located her earlier because the NAACP had been provided her last known St. Louis address in discovery. Yet the NAACP had very good cause for proferring her testimony late (she had changed her name and moved); she was the only late-proferred witness, and there was no good reason not to hear her testimony. Since she was the only minority hired in a significant position during the license term, the record could not have been complete without her testimony. See NAACP Exceptions at 3-4 ns. 6-8

7/ I.D. at 9907 ¶194 and 9916 ¶254.

8/ I.D. at 9912 n. 23. See NAACP Findings & Conclusions ("NAACP F&C") at 93-127, enumerating 71 such misrepresentations. Some of the most palpable ones are found in the NAACP's Exceptions at 14-15. The Commission is encouraged to thoroughly review the record and evaluate these misrepresentations so as to avoid the scandal which would obtain if any licensee, for whatever reason, got away with this.

9/ The misrepresentation issue designated in the HDO is a general one; there was no need for motions to enlarge for each individual misrepresentation. See HDO, 9 FCC Rcd 914, 925 ¶¶30-32 (1994). A general misrepresentation issue applies to all evasions and omissions, and in a hearing, candor is always in issue. See, e.g. Nick J. Chaconas, 28 FCC2d 231, 233 (1971).

10/ Every applicant has notice of the requirement that it not commit misrepresentations. 1986 Character Policy Statement, 102 FCC2d 1179, 1201-11 (1986). KFUO had 70 years of stewardship to learn of its duty of candor, and its awareness was heightened by the five years of prehearing litigation. Indeed, KFUO was obsessed with license retention even before the NAACP entered the picture. See I.D. at 9898-99 ¶¶119-123 (discussing Lauher's memoranda.)

Another procedural ruling permitted KFUO to obtain the NAACP's trial strategy through a subterfuge of questionable legality.[11] This win-at-any cost behavior, the moral equivalent of receiving stolen property, should have dispelled any thought that KFUO, albeit a large licensee,[12] should be treated as being above the law.[13] The Commission cannot tolerate a licensee which "'would stop at nothing' to secure renewal[.]" Chronicle Broadcasting Co., 19 FCC2d 240, 241 (Rev. Bd. 1969).

Judge Steinberg scrupulously avoided the interjection of extraneous factors into the proceedings,[14] conducted the hotly contested proceedings with wonderful good humor and grace, and produced a well written opinion. Nonetheless, his lack of understanding of discrimination,[15] his unwavering refusal to referee a fair fight, and his concentration on irrelevant factors as long as they favored KFUO,[16] compel the conclusion that he is incapable of supervising a civil rights case fairly.

11/ We refer to the incident in which KFUO attorneys obtained from Thomas Lauher, KFUO's leadoff and most critical witness (as he had written deeply inculpatory memoranda about KFUO's EEO compliance), a transcript of an interview that Lauher fraudulently induced the NAACP's law clerk to undertake for the purpose of making Lauher an NAACP witness, even though Lauher was already KFUO's witness! KFUO's attorneys knew in advance that Lauher would be interviewed by the NAACP, did not warn the NAACP that Lauher was already their witness, later received an oral summary and transcript of Lauher's interview with the NAACP's representative and didn't notify the NAACP of that fact. See NAACP Exceptions at 16-20. Thus, KFUO learned surrepitiously of which facts the NAACP did and did not believe to be significant -- information which KFUO was not entitled to know. This disgusting incident is not even mentioned in the Decision.

12/ The Lutheran Church, as an institution, would hopefully not condone the misconduct of these radio stations. But the misconduct was undertaken by a secular and nonecclestical body, the Board for Communications Services, to which the Lutheran Church delegated day to day stewardship over the stations. I.D. at 9882 ¶19. This critical fact is nowhere mentioned in the Decision. The Lutheran Church simply failed to properly oversee its rogue subsidiary. That is why this case is not a test of the FCC's attitude toward "religious broadcasting."

13/ The I.D. and the Decision each relied on several utterly irrelevant factors involving the nonbroadcast "history" of the parent licensee. I.D. at 9884 ¶¶36-41 and Decision at 2 ¶9 and 6 ¶30. These factors have absolutely nothing to do with this case

14/ See Transcript of Oral Argument, February 9, 1996, at 1132-33

15/ For example, the ALJ suggested that the NAACP could contact the minority employees to see if they were happy with their experience at KFUO. Devantier Dep. Tr. 91. While a discriminator doesn't tell minorities what he think of them, discriminators often commit these thoughts to writing or disclose them to colleagues who are not members of the affected class. Yet, as noted at 2 ¶4 supra, the ALJ refused the NAACP access to the written files which could have revealed KFUO's discriminatory intent or disclosed who could testify about it.

16/ For example, the ALJ found exculpatory value in a KFUO manager's private decision to adopt a child of another race. I.D. at 9886 ¶47 and 9908 ¶195. Unfortunately, this individual had failed repeatedly to exercise his duty to insure that KFUO obeyed the EEO Rule. Nothing is less appropriate for the state's notice than the race of one's loved ones. Loving v. Virginia, 388 U.S. 1 (1967). People have children for a variety of reasons, none of which is the FCC's business.

The disconnect between the core preliminary finding of the unanimous Commission in its HDO[17] and the central finding of the ALJ[18] (regrettably affirmed by the Decision without meaningful discussion)[19] is so palpable that the NAACP has concluded, with regret but with the greatest respect for all concerned, that if reversal on the present record is deemed impossible, the case must be remanded to a different ALJ.

17/ The HDO, 9 FCC Rcd at 924-25 ¶¶25-26, found that KFUO's policies were "inherently discriminatory."

18/ The ALJ concluded that there was "not a scintilla of evidence" of discrimination. I.D. at 9907 ¶194 and 9916 ¶254. If there is any doubt that the ALJ meant to overrule the HDO on this central point must be resolved through the ALJ's own words:

> In its Opposition to Petition to Deny, [KFUO] argued that any lack of minorities at KFUO-FM should be excused because there were a miniscule number of minorities in the service area who were interested in classical music. The HDO apparently considered this argument as "inherently discriminatory." (HDO at paras. 25-26). However, the advancement of such an argument, in and of itself, does not establish a discriminatory mind-set on the part of [KFUO].

I.D. at 9908 ¶198. No evidence of discrimination not already before the Commission when it designated this case was presented to the ALJ, because his discovery and admissibility rulings rendered it impossible to develop such evidence; see pp. 2-3 ns. 2-6 supra. However, no material evidence of nondiscrimination was presented to the ALJ which had not already been pled at length to the full Commission before the HDO was voted out. Thus, the core holdings in the I.D. and Decision are absolutely irreconcilable with the HDO.

19/ The Commission is respectfully referred to the NAACP's Exceptions, at 6-16, detailing the eleven ways in which the I.D. accomplished its de facto overruling of the HDO. The NAACP argued that:

- The ALJ's failure to appreciate that KFUO's Blacks-don't-listen-to-classical-music argument was invented for only one purpose: to excuse KFUO's hiring of Whites only for years. His suggestion that the FCC actually "invited" this racist statement is just astounding. I.D. at 9908 ¶199. Florida NAACP v. FCC, 24 F.3d 271 (D.C. Cir. 1994), relied on in the I.D. at 9908 ¶198 and in the Decision at 3 ¶15, involved nonracial factors (commuting distance, agricultural employment) affecting who should be included as a member of the potential applicant pool -- not objectionable racial stereotypes about the "qualifications" of those who are acknowledged to be included in the pool.

- The ALJ treated the fact that no Blacks were rejected for want of a classical background as affirmative evidence of nondiscrimination. I.D. at 9908 ¶197; aff'd, Decision at 3 ¶14. This is fatuous. KFUO's nonexistent EEO program surgically prevented Blacks from learning of (and thus applying for) nonsecretarial jobs. Tr. 514, 820, 822-26, 880.

- The ALJ found that KFUO couldn't have discriminated because nobody complained. I.D. at 9907-9908 ¶194; aff'd, Decision at 3-4 ¶16. Apart from the fact that no discovery was permitted to determine whether this was true, this astonishing holding overlooks the fact that discrimination victims don't know what's been done to them unless the employer is stupid enough to post a "we discriminate" sign. That is why "[d]iscrimination may be a subtle process which leaves little evidence in its wake." Bilingual Bicultural Coalition on the Mass Media v. FCC, 492 F.2d 656, 659 (D.C. Cir. 1974).

(n. 19 is continued on p. 6)

12/ (continued from p. 5)

- The ALJ relied on KFUO's hiring of secretaries, receptionists and janitors as evidence of a lack of discriminatory intent, holding that "[i]f [KFUO] had been bent on racial discrimination, it is highly unlikely that these African American...individuals would have filled any position at the Stations." I.D. at 9908 ¶196, aff'd, Decision at 4 ¶17. The hiring of Blacks as receptionists, secretaries and janitors exclusively is hardly evidence that Blacks would have been considered for classical music jobs, given KFUO's stereotypical views about Blacks and classical music. It is far too late in the course of EEO jurisprudence to seriously debate the self evident, fundamental proposition that the hiring of Blacks in low level jobs does not prove an intention not to discriminate in upper level jobs. Rust Communications Group, Inc. (HDO), 53 FCC2d 355, 363 (1975) (licensee considered only certain jobs "suitable" or "feasible" for minorities). The failure of the ALJ and the Board to understand this most basic principle seriously undermines the credibility of their respective decisions.

- The ALJ erroneously read into KFUO's hiring of a Hispanic woman a desire to hire Blacks. I.D. at 9908 ¶196, aff'd, Decision at 4 n. 17. But KFUO's stereotypes about classical music expertise targeted Blacks specifically. Minorities are not fungible; animus against one minority group is often specific to that group. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989).

- The ALJ failed to draw adverse inferences of likely discrimination from the statistical record, although "statistical evidence of an extremely low rate of minority employment could constitute a prima facie showing of discrimination." Stone v. FCC, 466 F.2d 331 at 329-330 (D.C. Cir. 1972). The record could not have been more extreme: KFUO hired no African Americans except as secretaries, receptionists or janitors; KFUO did not even receive an application from an African American except for a position as a secretary, receptionist or janitor. In no case did an African American compete against more than token White opposition for a job (because KFUO recruited for these positions, and only for these positions, from mostly Black sources) -- showing that the receptionist, secretarial and janitor jobs for which African Americans were considered were essentially set aside for them. See KFUO Ex. 4, Tab 6. No more complete shut-out of African Americans from broadcast opportunity has appeared in the Commission's annals in this generation. See discussion in NAACP F&C ¶¶43-47.

- The ALJ failed to draw any adverse inference from KFUO's failure to comply with the Commission's very modest job recruitment requirements. Deliberate and systematic failure to comply with an affirmative action plan is strong evidence of an intent to practice discrimination. See Craik v. Minnesota State University Board, 731 F.2d 465, 472 (8th Cir. 1984). All KFUO had to do was send letters to a few organizations when jobs were open, and say in its advertising that it's an equal opportunity employer. Instead, KFUO advertised for jobs three times without an EEO notice. I.D. at 9892 ¶80 and 9911 ¶219; Decision at 3 ¶13. As for minority recruitment, KFUO did virtually nothing, failing even to draw on the considerable talents and resources of the Director of its parent body's Commission on Black Ministry. Tr. 718-20 (Testimony of Rev. Bryant Clancy).

- The ALJ credited KFUO, through Lauher, with making "laudable efforts" to correct its deficiencies. There were no such efforts or correction. All Lauher did was send a condescending, dishonest, one-shot letter to a handful of organizations and colleges. I.D. at 9898 ¶119. Lauher's letters did not notify the universities and personnel agencies of any actual jobs. Instead, the letters said that KFUO would be contacting them as openings arise -- which never happened. Id. at 9898 ¶122. The letters even enclosed an insulting "response form" asking the recipient -- busy professionals all -- 'to acknowledge that I have received a letter from Station KFUO-FM seeking female and minority referrals for job openings at the station." Id. at 9898 ¶119.

(n. 1, including the last bullet point, are continued on p. 7)

II. The Penalty For Discrimination Or Misrepresentation Is Nonrenewal

The ALJ found that KFUO discriminated ("improperly gave preferential hiring treatment") on the basis of religion.[20] Incredibly, although this was the first time in ten years that an FCC judge found that any of the Commission's 13,000+ broadcasters discriminated, the Decision only mentioned the ALJ's holding without discussing or drawing conclusions about it.[21] And neither the I.D. nor the

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[19] (continued from p. 6)

After firing Lauher, KFUO didn't even bother sending more of those letters, and it did nothing else either until the Petition to Deny was filed. Id. at 9899 ¶123. Then, in a flurry of activity in the last two days of the license term, KFUO set aside two low level jobs for Blacks. Id. at 9899 ¶130. After that -- even while under investigation! -- KFUO continued to prevent Blacks from learning of job openings. In 1991, KFUO did not contact minority sources, although it filled at least two positions that year -- an AM announcer and a secretary. MMB Ex. 6, p. 5 (KFUO used the Lutheran Employment Project in 1991 for a secretarial but not an announcer vacancy.) Continuing through June, 1994, other than the secretary/receptionist and janitor positions filled in January, 1990, KFUO never placed an ad in the St. Louis Sentinel. NAACP Ex. 10.

- The ALJ failed to consider that KFUO's dozens of EEO-related misrepresentations (discussed at p. 3 and n. 10 supra) constitute overwhelming evidence of discriminatory intent. See, e.g., Beaumont NAACP v. FCC, 854 F.2d 501, 508 (D.C. Cir. 1988). These misrepresentations came in the face of an EEO Branch investigation which involved an unprecedented four inquiry letters. Imagine the Commission having to write four letters to every renewal applicant to get at the truth. It would be doing nothing else.

- The ALJ failed to consider that discriminatory intent can be inferred from pretextual excuses. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255 and n. 10 (1981). As the NAACP F&C explains in detail, KFUO trotted out virtually every pretext known to EEO law: our managers turned over (see NAACP F&C ¶¶168-202); we had no money (see NAACP F&C ¶¶159-167); we didn't pay much (see NAACP F&C ¶¶61-65); our lawyer didn't stop us (see NAACP F&C ¶¶203-217); Blacks don't listen to our stations anyway (see NAACP F&C ¶¶250-278); you have to be a Lutheran to answer our phones properly (see NAACP F&C ¶¶70-107); we get free rent from a 99% White school (see NAACP F&C ¶¶51-60). There was neither substance nor evidence supporting any of these pretexts. A nondiscriminator would resort to none of this nonsense.

- Finally, the ALJ and the Board relied on the parent religious body's liberal politics and nonbroadcast racial integration as evidence of the church subsidiary's lack of discriminatory intent. I.D at 9908 ¶195, aff'd, Decision at 6 ¶30. How the ALJ could find these factors decisional, while finding the testimony of all five NAACP experts and the only minority nonsecretarial employee KFUO hired too irrelevant even to admit to allow the parties to write findings and conclusions, we do not understand at all. It is ironic, at best, and certainly evidence of a "curious neutrality", that nonbroadcast discrimination is not even reportable. See 1990 Character Policy Statement, 5 FCC Rcd 3252 (1990), recon. denied, 6 FCC Rcd 3448 (1991).

[20] I.D. at 9908 ¶200; see discussion, id. at 9908-9909 at ¶¶201-204.

[21] Decision at 2 ¶10. The last ALJ holding of discrimination occurred in Catoctin Broadcasting of New York, Inc. (I.D.), FCC 86D-52 (Miller, ALJ, 1986), aff'd, 2 FCC Rcd 2126 (Rev. Bd. 1987), aff'd, 4 FCC Rcd 2553 (1989), recon. denied, 4 FCC Rcd 6312 (1989), aff'd per curiam by Memorandum, No. 89-1552 (released December 18, 1990).

Decision even mentioned the longstanding precedent that discrimination must result in nonrenewal.[22/]

Just as surprising was the I.D.'s and Decision's conclusion that multiple, deliberate, material misrepresentations designed to cover up discrimination are not disqualifying.[23/] That conclusion, if affirmed, will in one sweep eviscerate decades of Commission character jurisprudence,[24/] reducing the standard for renewal to the question of whether or not a finder of fact believes that the applicant commits perjury on the witness stand.[25/]

22/ "[I]ntentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship." Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621, 629 (D.C. Cir. 1978). Renewal is not permitted simply because the discrimination was based on religion, not race. The EEO Rule contains no hierarchy of acceptable or unacceptable types of discrimination. Indeed, if a broadcaster can keep his license after using a job application form saying "Lutherans are given preference", the next case will be an application form saying "Catholics and Jews are disfavored" or "Aryans are preferred."

23/ I.D. at 9918 ¶¶259-261. The Board considered the lack of candor question "a much more serious and troublesome problem" than the discrimination question. Decision at 6 ¶31. The Bureau's Findings and Conclusions recommended denial of the applications based on lack of candor, but the Bureau inexplicably changed its position when the case reached the Board. Transcript of Oral Argument, Tr. 1160-61.

24/ Nothing in the 1986 Character Policy Statement, 102 FCC2d at 1233-24, relied on by the I.D. at 9918 ¶258, changed that. When the Commission is presented with serious substantive misdeeds followed by a massive coverup, it must deny renewal. RKO General, Inc. v. FCC, 670 F.2d 231, 233 (1981); Sea Island Broadcasting Corp. v. FCC, 627 F.2d 240 (D.C. Cir.), cert. denied, 449 U.S. 834 (1980); Lorain Journal v. FCC, 351 F.2d 524 (D.C. Cir. 1965). Nonrenewal is particularly compelled when the misrepresentations were "result-oriented and not the product of confusion or innocent error." Evansville Skywave, Inc., 9 FCC Rcd 2539, 2541-42 ¶20 (1994).

25/ The Board apparently believes that renewal must be denied only where "a 'cover up' has continued into the hearing", citing Center for the Study and Application of Black Economic Development, 10 FCC Rcd 2836 ¶6 (Rev. Bd. 1995) (subsequent history omitted) and relying on its belief that KFUO "testified truthfully at the hearing." Decision at 6-7 ¶31. But UCC II teaches that operation grossly at variance with the public interest requires nonrenewal even if the applicant does not commit perjury on the witness stand. The contention that a KFUO witness told the truth at the hearing is, at most, the absence of an additional argument for nonrenewal. See I.D. at 9918 ¶259. It is hardly an affirmative argument for renewal. A broadcast license is not conveyed as a reward for coming to court, after a night of preparation with experienced counsel, and not committing perjury under oath with a judge and a table full of attorneys in the room. Broadcasting isn't so trivial, and a license isn't so cheap, that the value of a renewal is telling the whole truth on the fifth try

Nor is there any merit to the suggestion that KFUO deserves a renewal expectancy because it didn't get caught discriminating for decades. Id. at 9918 ¶260. Such an expectancy would violate §304 of the Act. Pre-renewal term compliance (assumed in the I.D., even though there was no discovery or trial on that issue) does not excuse gross renewal term noncompliance. If anything, a long tenured licensee especially ought to know better than to lie and discriminate. If the FCC can't trust a licensee with 70 years of experience to obey the rules, who can it trust?

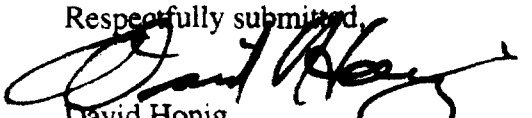
(n. 25 continued on p. 9)

CONCLUSION

The I.D. and the Decision are "a complete and shameless whitewash."[26/]

This case threatens to become the FCC's Plessy v. Ferguson.[27/] In its wake, no act of discrimination, unaccompanied by on-the-stand perjury, will ever result in denial of renewal -- further accelerating the decline in opportunities for minorities to enter, work in, and become entrepreneurs in broadcasting.[28/] The Commission must emphatically reverse.

Respectfully submitted,



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June 3, 1996

25/ (continued from p. 8)

Furthermore, there is no merit to the I.D.'s suggestion that KFUO's wrongdoing is an "isolated occurrence, an aberration, confined to a single Commission investigation", id. at 9918 ¶260. KFUO's misconduct was systematic, massive and repeated. This "aberration" theory would excuse every licensee which commits misconduct only in one license term. It would amount to a seven year "Get out of Jail Free" card for every new licensee in its first license term, because a new licensee wouldn't have had enough time to repeat its misconduct in a successive term. Indeed, the effect of this theory is that the FCC would have to try an applicant twice before taking its license away. With eight year renewals and four years for the typical trial and appeals, no renewal could be denied without a 20 year fight. Such a regulatory scheme would provide no incentive to licensees to be law abiding in the first instance, since they would know that, if caught, they could either start obeying the law in the next license term or they could sell the stations. See Jefferson Radio Corp. v. FCC, 340 F.2d 781 (D.C. Cir. 1964).

Finally, there is no merit in the I.D.'s suggestion that KFUO's behavior is excusable because it was attributable only to one person, Dennis Stortz. Id. at 9918 ¶259. Stortz was not a low level functionary -- he was the chief operating officer! Nor was Stortz the kind of executive who deceives his supervisors, conceals his actions from them, or prevents them from supervising him. While there is plenty of evidence that Stortz wasn't truthful with the FCC, there's no evidence that he was ever untruthful to any Lutheran Church official, and KFUO nowhere denies that Stortz was fully authorized to act in its behalf, serve as the primary point of contact with counsel, and sign declarations supportive of pleadings. Not only did KFUO not supervise Stortz during the license term, it promoted him, and he is still the General Manager. Compare TelePrompTer Cable Systems, Inc., 40 FCC2d 1027 (1973) (after misconduct surfaced, a new board of directors was elected as expeditiously as possible. The new board initiated a special study to inform it on how to prevent recurrences, and management began a housecleaning to purge itself of past misconduct.)

26/ Thurgood Marshall, commenting on the City of New York's investigation of the Stork Club's infamous refusal of service to Josephine Baker in 1951. Tom Cowan and Jack McGuire, Timelines of African American History (1994), p. 217.

27/ 163 U.S. 537 (1896).

28/ EEO Streamlining (Order and NPRM), FCC 96-49 (released February 16, 1996) at 3 ¶3.

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 3rd day of June, 1996, caused a copy of the foregoing "Application for Review" to be delivered by U.S. First Class Mail, Postage Prepaid, to the following:

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